Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS HAROLD H. THURSTON, CHRISTOPHER J. CLARK, AND C.A. PARKHILL

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QUESTIONS PRESENTED

1. Whether an airline that involuntarily retires pilots at age sixty, strips them of their seniority, and refuses to allow them to transfer to flight engineer while allowing all similarly-situated younger pilots to retain their employment, has violated the Age Discrimination in Employment Act (ADEA).

2. Whether the violations of the ADEA were willful.

3. Whether unions are liable for back pay under the ADEA.

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STATUTES AND REGULATIONS INVOLVED

In addition to the statutes set forth in the brief of petitioner Trans World Airlines, Inc. (TWA) (Br. 2-5) and in the statutory appendix to the brief of respondent Equal Employment Opportunity Commission (EEOC), another statutory provision involved is Section 15(a) of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. §215(a), which provides in relevant part:

> After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
>
> * * *
>
> (2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; . . . .

STATEMENT OF THE CASE

Respondents Harold H. Thurston, Christopher J. Clark, and Clifton A. Parkhill (Thurston respondents) adopt the Statement contained in the brief for EEOC.

This further statement is: (a) to focus on events in 1978, the year in which the Thurston respondents and four of the EEOC claimants (Lusk, Bobzin, Gowling, and Widmayer) turned age sixty and were forced to retire; and (b) to point to facts before the courts below regarding the states of mind of respondents TWA and Air Line Pilots Association, International (ALPA) in 1978 with respect to the Age Discrimination in Employment Act (ADEA) and the issue of employment of flight engineers beyond age sixty.

The parties agreed in the court of appeals that the case was in an appropriate posture for summary judgment as to liability. 713 F.2d 940, 944 n.5, 947 (A-5 n.5, A-13).[1] The record in this case is compiled principally from business records of TWA and ALPA, and from deposition testimony taken of petitioners' principals.

A. Preliminary Factual Matters.

A number of TWA's factual characterizations must be viewed in light of the undisputed facts:

[1] "A-__" refers to the decisions below which are reprinted in the appendix to TWA's December 16, 1983 petition for certiorari. "J.A. __" refers to the Joint Appendix filed in the Second Circuit which the parties may cite by permission of this Court (52 U.S.L.W. 3687). "R. __" refers to the numbered entries on the district court clerk's docket, reproduced in the Joint Appendix (J.A. 9-20).

1. *83% "success" rate.* TWA states "83% of those Captains seeking to serve beyond age 60 have succeeded in that regard" (Br. 10). A company review at the end of 1978 shows (R. 96, Ex. 1; R. 175, Ex. 22):

> Pilots retired at age sixty between April 6, 1978 and December 31, 1978—40
>
> Number of pilots who have expressed a desire to fly as flight engineers after age sixty—17
>
> Number of pilots who have been awarded a flight engineer bid and are flying as flight engineers—zero.

TWA did not employ age sixty Captains in the flight engineer position in 1978. The first two successful Captain bidders did not enter flight engineer training until the spring of 1979 after they reached age sixty (J.A. 675; R. 168, pp. 148-49).

2. *"Only trunk airline."* The fostered implication of TWA's carefully worded statement (Br. 29 and n.37)[2] is that it did not react to ongoing legal proceedings in changing its mandatory retirement policy. Prior to August 1978, TWA was in litigation on the issue in various administrative forums. Respondent Thurston had filed age dis-

[2] Almost all major carriers employ or have agreed to employ flight engineers beyond age sixty: Alaska, American, Braniff, Capitol, Continental, Federal Express, Flying Tiger, Northwest, Pan American, TWA, United, USAir, and Western. TWA is aware that there are around 500 flight engineers over age sixty on these carriers. The fact that at least six airlines have agreed to enter into consent decrees providing for the employment of former Captains as flight engineers beyond age sixty does not make their action any less "voluntary" than TWA's: *Worley v. Continental Air Lines, Inc.*, No. CV-80-1110-WMB(Kx) (C.D. Cal., consent decree entered December 27, 1982); *Kiehl v. Pan American World Airways, Inc.*, No. C-81-4274-WAI (N.D. Cal., consent decree entered Jan. 28, 1983); *Santorelli v. USAir, Inc.*, No. 81-1053-A (E.D. Va., consent decree entered Mar. 16, 1982); *Richardson v. Alaska Airlines, Inc.*, No. C-81-974V (W.D. Wash., consent decree entered Nov. 1, 1982); *Neuman v. Northwest Airlines, Inc.*, No. 79 C 1570 (N.D. Ill., consent decree entered April 5, 1983); *Penton v. The Flying Tiger Line, Inc.*, No. CV-81-4419-RJK (C.D. Cal.) (consent decree entered June 20, 1984).

crimination complaints with the U.S. Department of Labor and the State of California (R. 169, Exs. 7, 10). David J. Crombie, TWA's Senior Vice President of Administration, saw the Department of Labor complaint of another TWA crewmember as "a factor" in TWA's treatment of the issue, along with (J.A. 655):

> • The necessity to deal with this whole problem in a manner designed not to scar the relationship we have with ALPA.
>
> • The necessity to comply with the law expeditiously so that we do not build up a substantial back pay obligation.

3. *Bidding as the "basic mechanism."* TWA's fact statement (Br. 9-10) omits mention of displacements, the other principal mechanism of pilot movement under the contract. Section 19 of the pilot contract is entitled "Vacancies and Displacements," and Section 19(C)(1), which TWA partially quotes, requires TWA to "publish bulletins announcing vacancies, displacements, and assignment of pilots resulting from such vacancies and displacements" (J.A. 304).[3] These bulletins are referred to collectively as "bid messages" (R. 168, p. 123). Bidding for vacancies occurs with an increase in flying time or manpower requirements; displacements occur with a decrease (*compare* §19(D)(1)(a) *with* §19(G)(1)(b); J.A. 304, 311). Pilot movement resulting from vacancies and displacements is "simultaneously effected" (§19(A)(1), §19(D)(1)(b); J.A. 302, 305). As with vacancies, displacement preferences are granted on a seniority basis (§19(A)(2), J.A. 305; §17, J.A. 294). A pilot may use his seniority to displace a less senior

[3] The Thurston respondents were retired while the 1977 Working Agreement (J.A. 353) was in force. A larger portion of the 1979 Working Agreement is reproduced in the Joint Appendix (J.A. 250). Changes from the 1977 agreement are indicated by black lines in the margin (*see* J.A. 252).

pilot in any status at his current or last former domicile (A-11; §19(G), J.A. 311).

Between the April effective date of the 1978 ADEA Amendments and September 1, 1978, there were no flight engineer vacancies announced (A-10; R. 175, Ex. 16; J.A. 1020), although numerous displacements of pilots occurred (*see, e.g.*, R. 169, Ex. 5).

4. *"Minute" downgrading of pilots.* The court of appeals outlined various types of movement among younger pilots which result in a downgrade rather than the pilot losing his or her job (A-10 to A-11). Although there is no dispute that these practices occur under contractual and extra-contractual mechanisms, TWA now focuses on quantity, saying that the absolute numbers are "minute."

The court of appeals did not elaborate on the number of pilots who have bid or displaced to lower positions pursuant to posted bid messages, as it was undisputed that this practice occurred regularly. Instead, the court focused on situations where pilots under age sixty, dislodged from their former positions because of medical or other disqualifications, did not lose their employment totally. TWA's manpower planning head, Joseph Bryner, testified about these occurrences:

> **Disciplinary downgrades:** "many instances" (J.A. 972); "Many times, over many years" (J.A. 1025). Disciplinary downgrading is not addressed in the contract (R. 168, p. 146).
>
> **Medical downgrades,** §19(A)(3)-(4): two pilots are currently working as flight engineers under this practice, which first went in effect around 10 years ago (J.A. 968-70).
>
> **Student Captain or copilot failure to qualify,** §6(B)(16): 20 permanent flight engineers (J.A. 946-47; J.A. 634).

Failure to requalify in pilot position, §6(B)(17): 10 to 12 in the past 3 to 5 years (J.A. 947-48, 997; J.A. 634).

5. *Flight engineer "status."* The August 10, 1978 bulletin issued by TWA states that "any cockpit crew member who is in a flight engineer status at age 60 may not be compelled to retire" (J.A. 425). The term "flight engineer status" was not defined (A-9).

"Flight engineer status" as used in the bulletin meant different things for different crewmembers. TWA interpreted it to include active and retired flight engineers as well as active and retired International Relief Officers (IROs) (J.A. 587). For Captains and First Officers, TWA interpreted the bulletin to mean that they had to bid on and be awarded a flight engineer vacancy with an "effective date" prior to the sixtieth birthday (A-9). This excluded retired Captains and First Officers (A-10).

The term "flight engineer status" as used in the August 1978 bulletin was for "purposes of policy," as distinguished from "status" under the pilot contract (R. 98, p. 368; *see id.* at 274, 370). IROs, for example, are in a contractual status separate from flight engineers (J.A. 1012-13; R. 98, pp. 270-74; R. 167, pp. 87-88; §33(F), J.A. 339-40). Except at age sixty when TWA drops them to flight engineer for policy purposes (J.A. 971), IROs must "bid like everyone else" if they want to become flight engineers (R. 98, p. 274). IROs, like other pilots, are subject to the FAA's "Age 60 Rule," 14 C.F.R. §121.383(c) (J.A. 1026; R. 98, p. 371).

Similarly, some Captains who have remained employed beyond age sixty have not actually become flight engineers until well after age sixty. For contractual and pay purposes, they remain in the "actual status of captain" with the "assigned status of flight engineer" (J.A.

989). Until 1980, TWA regularly scheduled flight engineer training to begin after the Captain's sixtieth birthday and after the "effective date" of the bid (J.A. 675). One TWA Captain turned age sixty in November 1979 but was not scheduled to begin flight engineer training until March 1980 (J.A. 988; J.A. 765, line 10).

B. Harold H. Thurston.

Respondent Thurston turned age sixty on June 11, 1978. His request to work beyond age sixty (J.A. 909) was denied not for lack of flight engineer vacancies, but solely because of age. The May 26, 1978 response to his request from J.E. Frankum, TWA's Vice President of Flight Operations, stated (J.A. 647):[4]

> As you are aware, TWA's agreement with ALPA, which applies to you, as well as the retirement program established thereunder, provides that retirement is required upon reaching one's 60th birthday. Accordingly you will be duly retired on that date.

There were no considerations requiring Thurston's retirement other than the mandatory retirement age stated in the letter (R. 98, p. 320). Prior to this date, however, TWA had already recognized that the "new age 70 law destroys our defense for such retirement" (R. 165, *ALPA* Hilly Ex. 1).

C. Christopher J. Clark.

On July 19, 1978, respondent Clark wrote TWA to request to continue his employment beyond age sixty. By letter dated August 3, 1978, Joseph C. Hilly, TWA's Vice President of Labor Relations, wrote Clark to inform him

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[4] EEOC claimant Bobzin, who turned sixty on May 9, 1978, received a similar response (J.A. 643-44).

that TWA had not yet finalized its age sixty flight engineer employment practices. Mr. Hilly stated (J.A. 648):

> Accordingly, for the time being at least, you will not be permitted to work as a flight engineer after you become sixty years of age. I want to assure you, however, that should our policies ultimately be such that they would have permitted you to continue to work after attaining age sixty, you will be reinstated effective on your sixtieth birthday, with the pay and benefits then applicable to flight engineers who continue to work after age sixty.

Mr. Clark relied upon Mr. Hilly's letter and understood it to mean he did not have to place a flight engineer bid (J.A. 922-24, 928). Despite TWA's assurance, Clark was required to retire on September 19, 1978.[5]

D. Clifton A. Parkhill.

Respondent Parkhill's sixtieth birthday was August 22, 1978. Prior to his sixtieth birthday, he bid the flight engineer vacancies with the "effective date" of September 1, 1978 (J.A. 916-17). His bid was denied and he was required to retire.[6]

The flight engineer awards effective September 1, 1978 were announced on August 30, 1978 (J.A. 471). Normally TWA posts vacancies months ahead of the effective date (R. 168, pp. 15, 139-40).

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[5] Respondent Clark contacted his chief pilot three times following TWA's August 10 announcement to inquire about his status. He was told that it was being handled out of TWA corporate headquarters and "I can't touch it with a ten-foot pole" (J.A. 923-28; *see* R. 96, pp. 86-87).

[6] Similarly, EEOC claimant Gowling, who turned sixty on August 27, 1978, had his flight engineer bid denied (J.A. 592).

TWA has the discretion to advance or defer the effective date of a bid (J.A. 932). There is no contractual timetable for getting a crewmember trained to fulfill his bid (J.A. 933). At times TWA defers training because of personal hardship problems (J.A. 936).

E. Evidence of Willfulness in 1978.

The Statement in the brief for EEOC discusses TWA's short-lived July 1978 policy decision to comply fully with the ADEA and reemploy former Captains, such as respondent Thurston, without requiring a flight engineer bid (J.A. 426-27). Captain J.E. Frankum, TWA's Vice President of Flight Operations, "disavowed" that decision (J.A. 1005A). The "conscious decision" not to reinstate Thurston and other Captains who had been mandatorily retired (R. 98, pp. 253-54) was followed by TWA's implementation of its August 10, 1978 bulletin (J.A. 425) in a manner which resulted in the mandatory retirement of respondents Clark and Parkhill and the remaining EEOC claimants (A-9 to A-12).

Other evidence before the courts below bears on the issue of willfulness. Over two months before Mr. Crombie's July 19, 1978 letter to ALPA stating TWA's views that the ADEA required the employment of pilots and flight engineers in the flight engineer position beyond age sixty, Mr. Crombie predicted that Captain Frankum would be "unhappy and difficult as to some of the implications of this new law,"[7] and would have to be persuaded that "probably we have no legal defense to continue to force flight engineers off the airplane before age 70" (R. 165, *ALPA* Hilly dep., Ex. 1).

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[7] Captain Frankum agreed that this was an accurate statement of his position (J.A. 809).

During the summer of 1978, Captain Frankum had discussions with TWA's outside counsel on the question of whether the ADEA required TWA to permit flight engineers to fly past age sixty. Frankum "didn't think a hell of a lot of" counsel's opinion (R. 97, p. 113), and told Mr. Crombie that "him and his lawyers were full of it" (*id.* at 158).[8]

Captain Frankum acknowledged that Mr. Crombie was the "prime mover" on the age sixty question and was representing TWA's corporate position when he wrote the July 19, 1978 letter to ALPA (*id.* at 156-57; J.A. 1003-04). As to the letter itself, Captain Frankum said (J.A. 1005):

> This letter was not written by Mr. Crombie. He signed it, but the letter and these options discussed here and this discussion of this whole damn thing was done by an attorney. I already told you before the attorney was ill-advised, misinformed and didn't know what the hell he was talking about.

"The attorney was wrong," Captain Frankum stated (R. 97, p. 198).[9]

By the time Captain Frankum took over responsibility on the age sixty ADEA issue when Mr. Crombie was hospitalized in early August 1978 (J.A. 1005A), there had

[8] Counsel agreed that, in addition to changes under Fed.R.Civ.P. 30(e), certain expletives would be deleted from Captain Frankum's deposition and would not be read in open court. The edited testimony is reflected here.

[9] Captain Frankum "didn't like their [outside counsel's] interpretation of the law because I hoped it would be different" (R. 97, p. 115). He asked a TWA staff member who had just graduated from law school to look at outside counsel's interpretation "specifically with the interest of continuing retirement at age 60 for all status of flight crew members. He was particularly interested in precluding flight engineers working beyond age 60 and asked me to review the ADEA and see what my opinion was." (J.A. 833; *see* R. 167, p. 22).

been numerous meetings among TWA upper management on the subject. Counsel was present at a number of these meetings.[10] TWA representatives met with ALPA representatives as well, and counsel for one or both sides participated at times.[11] At a meeting in July attended by Frankum, Crombie, Hilly and outside counsel for both TWA and ALPA, there was "a lot of legal sparring around" concerning "what the law meant and what the law said" (R. 97, p. 204).

ALPA actively campaigned to persuade TWA to retain its age sixty mandatory retirement policy for all flight deck crew positions, and opposed TWA's action in August 1978 to attempt partial compliance with the ADEA (A-32). At first, ALPA appeared to accept the company's initial determination to comply fully with the amended law. On June 21, 1978, Jack Donlan, the Chairman of the ALPA Master Executive Council on TWA (MEC) issued a telex to MEC members (J.A. 1040):

> TWA is tentatively planning imminent announcement of plans to retain pilots and flight engineers in active employment after age 60, with duty as flight engineer. Also, pilots and flight engineers who have retired since April 6, 1978, will be offered opportunity to return as flight engineer. Captains and First Officers desiring training as flight engineer will be so qualified.
>
> The above is in accordance with the "Age Discrimination in Employment Act" which became effective April 6, 1978, and with our Working Agreement.

Shortly afterwards the MEC met, and heard from Mr. Crombie about TWA's plans to change its mandatory re-

[10] R. 97, pp. 113, 152-59; R. 167, pp. 11-13, 15, 24-27.

[11] R. 97, pp. 198, 202-05; J.A. 1033-55; R. 165, *ALPA* Hilly Exs. 2, 7; R. 165, *Thurston* Hilly Ex. 3 at 3.

tirement policy (R. 97, p. 205). Thereafter, upon advice of outside counsel, the MEC resolved to file a lawsuit to prevent TWA from allowing anyone to work on the flight deck beyond age sixty before bargaining with ALPA, and to seek a declaratory judgment under the ADEA that TWA was not obligated to employ flight engineers beyond age sixty (R. 102, pp. 276-77 and Ex. 38; *see id.*, Exs. 37, 47).[12] Upon advice of outside counsel ALPA took the position that the 1978 ADEA Amendments were not in effect, and that until such later time as they became effective, the pilot contract did not allow anyone to work beyond the mandatory retirement age of sixty (R. 102, pp. 253-54; *see id.* at 231-38, 243-52, 257-60 and Exs. 32, 34, 35).

After ALPA filed its lawsuit, it submitted to TWA contract proposals regarding the employment of crewmembers beyond age sixty (R. 102, Ex. 36; *see* J.A. 58, 64-65 ¶30; J.A. 84, 87 ¶30). The proposed changes included, among others:

> §2(G), (H). Segregation and classification into a separate job category all flight engineers over age sixty, with flight engineers under age sixty given the new title "Second Officer."
>
> §17(A)(3). Provision for a separate seniority list for age sixty flight engineers, who would be furloughed before pilots under age sixty, and in reverse order so that the most senior would be furloughed first. Upon recall, all pilots under age sixty would be recalled in regular seniority order, and then age sixty flight engineers would be recalled, with the most senior recalled last.
>
> §23(B). Mandatory retirement for those who are not, or do not revert to, flight engineer before age sixty.
>
> §23(G), §24(C). Elimination of disability retirement income and insurance coverage for those disabled during employment beyond age sixty.

[12] That lawsuit was eventually filed on August 10, 1978, the same day TWA announced it would employ age sixty flight engineers. *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, No. 78 Civ. 3707 (S.D.N.Y.) (J.A. 108). Summary judgment was granted against ALPA by the district court (A-50 to A-54) and the Second Circuit unanimously affirmed (A-13 to A-21). The Second Circuit held that there was no jurisdiction to entertain ALPA's ADEA declaratory judgment action as an "attempt to use the Act to cut off the rights of its older members" (A-21). ALPA did not petition for certiorari with respect to the outcome in its own lawsuit.

Prior to the 1978 ADEA Amendments, ALPA had always opposed mandatory retirement rules based on chronological age (R. 101, Ex. 18). Right after the amendments, ALPA policy shifted to oppose age sixty downbidding to flight engineer (R. 102, Ex. 49). By November 1980, the ALPA Board of Directors formally endorsed age sixty mandatory retirement for all flight deck crewmembers, ordered "affirmative steps required to confirm such retirement age," and rescinded all prior policy opposing mandatory retirement (R. 115, Exs. 3-5).[13]

[13] The court of appeals noted ALPA's admission that it was motivated to oppose employment of its older members based on economic considerations in favor of younger members (A-17 n.11). The concern for economic impact on furloughees was stated by ALPA's president (R. 102, pp. 290-91), who also testified that ALPA had made no safety determination that age sixty was a BFOQ for cockpit service (R. 100, pp. 30-32). He was concerned that raising the age limit might bring on more stringent medical and proficiency monitoring requirements, which he felt would be like "pointing a gun at the heads" of airline pilots (*id.* at 43-46).

SUMMARY OF ARGUMENT

The Second Circuit found, on undisputed facts, that TWA had discriminated against the Thurston respondents and EEOC claimants solely on the basis of age. TWA mandatorily retired these senior crewmembers at age sixty, severed their seniority rights, and refused to allow them to transfer to the flight engineer position. In contrast, TWA permits all younger pilots disqualified from their positions for any reason to retain their employment and exercise their seniority rights. This direct evidence of discriminatory treatment based solely on age was unrebutted by legitimate nondiscriminatory reasons, and was not justified by either the bona fide seniority system (29 U.S.C. §623(f)(2)) or the bona fide occupational qualification (29 U.S.C. §623(f)(1)) exceptions to the ADEA.

The court below properly found willful violations of the ADEA. The legislative history and purposes of the ADEA demonstrate that Congress did not intend to impose the specific intent standard derived from criminal law as a prerequisite to finding willfulness under the ADEA. Moreover, courts have not interpreted willfulness under other civil statutes as requiring proof of specific intent. The correct standard is the willfulness standard utilized in FLSA cases, which requires a showing that the defendant knew or should have known its actions were governed by the ADEA. Alternatively, the Second Circuit test satisfies the civil intent standard and other ADEA court tests for willfulness.

The policies and purposes of the ADEA favor a holding that labor organizations are subject to liability for age discrimination on the same terms as employers. Furthermore, the express language of the ADEA provides for this result. All violations of ADEA Section 4 are violations of FLSA Section 15, which applies to "any person," including a union. Since ALPA has violated the ADEA, it is liable to the individual respondents for all statutory relief, including money damages.

ARGUMENT

I.

THE CHALLENGED ACTIONS CONSTITUTE UNLAWFUL AGE DISCRIMINATION.

A. The Mandatory Retirement of Plaintiffs, the Severance of Their Seniority Rights, and the Refusal to Allow Them to Transfer to Flight Engineer Were Because of Age.

It is undisputed that TWA retired the Thurston respondents and EEOC claimants at age sixty, severed their seniority rights, and refused to allow them to transfer to the flight engineer position (A-10 to A-12). It is undisputed that younger employees who are disqualified from their pilot (Captain or First Officer) jobs for medical, proficiency or economic reasons are not required to forfeit their seniority rights or lose their employment entirely (A-10 to A-11). It is undisputed that, in contrast to the treatment accorded Thurston and his colleagues, TWA grants the downgrading requests of *all* younger pilots with sufficient seniority (A-24).[14] Based on the undisputed facts, the court concluded that the "sole reason for [TWA's] discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA" (A-31).

[14] TWA states that "in any seniority system, not everyone gets what he or she wants" (Br. 25). Notwithstanding this truism, TWA does not dispute the court of appeals' finding that all younger pilots with sufficient seniority are permitted to downgrade.

TWA challenges the court of appeals decision by misstating the holding. The court did not hold that " 'because TWA routinely accommodates other employees . . . for non-age reasons,' it must 'accord the same treatment to age-60 captains and first officers.' " (Br. 16-17). In full context, the court's summary of its previous nine-page (A-22 to A-30) discussion of the merits of the case reads (A-31, footnote omitted):

> In short, because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim. The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA.

The court's holding proceeds from its analysis, on undisputed facts, that: (1) there was direct evidence of a differentiation based solely on age (A-24) and a conscious refusal on the part of TWA to retrain or relocate age sixty pilots solely because of age (A-30), which deprived respondents of employment and employment opportunities in violation of the ADEA (A-29); and (2) the statutory defenses asserted were legally insufficient to justify the discrimination (A-25 to A-29).

TWA twists the court's holding by seizing on the word "accommodates." This is a case about discrimination, not accommodation, *cf.* 42 U.S.C. §2000e(j). The court of appeals correctly defined the issue in a discriminatory treatment case such as this: whether an employer treats some people less favorably than others because of age (A-22 to A-23). 29 U.S.C. §623(a); *see* 29 U.S.C. §623(c); *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The actions challenged here were mandatory retirement, severance of seniority rights and refusal to transfer because of age. It was those acts which the court held to be violations of the ADEA. What TWA does to "accommodate" younger pilots disqualified from their jobs formed part of the unrebutted evidence of discriminatory treatment, *i.e.*, less favorable treatment because of age. Contrary to TWA's argument, the court did not create a "new right" of accommodation based on age[15] or expand an employer's ADEA obligations to require more than equal, nondiscriminatory treatment (A-29 to A-30). Instead, the court found specific violations based on well-established ADEA principles, and entered judgment accordingly.[16]

TWA attempts to escape the ultimate finding of discrimination by reverting to the district court's lockstep adherence to the *prima facie* case formulation in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). By addressing TWA's proffered reasons for its actions and finding them not to be "legitimate, nondiscriminatory rea-

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[15] TWA is incorrect in arguing that respondents received the same "accommodations" as younger crewmembers (Br. 17). At age sixty they were stripped of their seniority and lost all opportunity to exercise contractual entitlements, whether it be to bid on a flight engineer vacancy or to downgrade to flight engineer in the event of a medical disqualification.

[16] TWA alludes to general injunctive relief which may be sought by the EEOC at some later stage in the proceedings (Br. 20). The court did not rule on this request. TWA further attempts to stretch the court's holding with an out of context quotation from respondent Thurston's arbitration (Br. 20 n.22). There Thurston was pursuing his contractual rights under a grievance procedure, rights which are wholly apart from his ADEA rights. The arbitrator was not concerned with whether there was discrimination based on age in forcing Thurston to retire and in denying the downbid request, and the arbitration board expressly "render[ed] no opinion with respect to any legal rights that Captain Thurston might have under the ADEA" (J.A. 530). *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 104 S.Ct. 1799 (1984); *see Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 547-49 (9th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3722 (U.S. April 3, 1984) (No. 83-1545).

son[s]," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), the court of appeals correctly transcended the *prima facie* case stage of *McDonnell Douglas*. This Court has stated that the *McDonnell Douglas* formulation should not be used to "evade[ ] the ultimate question of discrimination *vel non*." *United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478, 1481 (1983). As the case was in a summary judgment posture (A-5 n.5), the court of appeals appropriately proceeded directly to the specific inquiry of "whether the defendant intentionally discriminated against the plaintiff." *Id.* at 1482, *quoting Burdine*, 450 U.S. at 253.[17]

The court of appeals framed the discrimination issue in the same manner as this Court has framed it in related contexts: whether the employer treats "some people less favorably than others" because of their membership in the protected class (A-22 to A-23). *Aikens*, 103 S.Ct. at 1482, *quoting Teamsters*, 431 U.S. at 335 n.15. The test is whether, but for respondents' age, their treatment would have been different. *See Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (sex discrimination). Under the ADEA, the courts of appeals almost universally have applied the "but for" test to mean that age must be a determining factor, *i.e.*, one that made a difference in the employment decision at issue.[18] Here the court found that age was not only "a

[17] Whereas this Court in *Aikens* was confronted with a full record on disputed facts, the principle is the same where the case is ripe for summary judgment. In either instance, the "court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.' " 103 S.Ct. at 1482.

[18] *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Smithers v. Bailar*, 629 F.2d 892, 896-97 (3d Cir. 1980); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Carter v. Maloney Trucking &*

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determining factor," but was the sole reason for TWA's actions (A-31).[19]

The court below correctly rejected a number of TWA's arguments repeated here. First, respondents were not barred by the *McDonnell Douglas* formulation from making out a *prima facie* case by the alternative method of adducing direct proof of age discrimination (A-22 to A-24). *See Spagnuolo*, 641 F.2d at 1113; *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981); *Stone v. Western Air Lines, Inc.*, 544 F.2d 33, 36-37 (C.D. Cal. 1982). TWA's attempt to confine the inquiry to whether there was a flight engineer "vacancy" begs the ultimate issue of discrimination in this case, where downward movement to flight engineer among younger pilots occurred by contractual mechanisms other than bid vacancies and, in some instances, without authority in the contract at all (pp. 5-6, *supra*).[20] Second, the fact that some age sixty Captains have successfully downbid to flight engineer does not justify the discrimination against respondents (A-25).

[18] *continued*
Storage, Inc., 631 F.2d 40, 42 (5th Cir. 1980); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975); *Golomb v. Prudential Insurance Co. of America*, 688 F.2d 547, 550-51 (7th Cir. 1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981); *Anderson v. Savage Labs*, 675 F.2d 1221, 1224 (11th Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C. Cir. 1982).

[19] Under the "age as a determining factor" test, an ADEA plaintiff is not required to prove that age was the exclusive reason for the employment decision. *Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 725 (1983); *Golomb*, 688 F.2d at 551-52.

[20] TWA now says that such downgrading by younger pilots is "minute." The undisputed facts show otherwise, especially with regard to displacements which occur in the absence of vacancies (pp. 4-5, *supra*). Moreover, the absolute number of younger pilots who have utilized the specialized provisions to downgrade to flight engineer rather than lose their jobs entirely is irrelevant. The fact that TWA and ALPA have institutionalized the procedures means that they are available for all who need them, except for age sixty Captains and First Officers.

Connecticut v. Teal, 457 U.S. 440, 455 (1982). Besides, TWA did not allow any age sixty Captain to work as a flight engineer until 1979, after the Thurston respondents and the majority of the remaining EEOC claimants had turned age sixty.[21] Third, the finding of liability here does not afford respondents "special treatment" or "special working conditions." The court cited the same ADEA principles referred to by TWA here and found (A-29 to A-30): "Appellants do not ask for 'special treatment,' *Parcinski*, [673 F.2d at 37]; rather they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing 'special' or 'preferential' about equal treatment." The court also pointed out that TWA's "conscious refusal" to transfer age sixty Captains and First Officers violated the ADEA's ban on equal treatment (A-30). *Williams v. General Motors Corp.*, 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Coates v. National Cash Register Co.*, 433 F.Supp. 655, 661 (W.D. Va. 1977).

B. The ADEA §4(f)(2) Bona Fide Seniority System Defense Is Inapplicable.

TWA argues that its actions are justified by the "bona fide seniority system" exception in ADEA Section 4(f)(2), 29 U.S.C. §623(f)(2). Although this was one of TWA's principal statutory defenses rejected by the court of appeals, it was absent from the petition for certiorari. If it is to be considered, *cf.* Supreme Court R. 21.1(a), it should be rejected for the reasons stated by the court of appeals (A-25 to A-26):

> TWA asserts that its contested practices are part of a bona fide seniority system and thus liability is foreclosed under 29 U.S.C. §623(f)(2). Appellants, however, do not challenge the operation of the seniority system, but their summary exclusion from it at age 60. The employment practice at issue in this lawsuit—the severing of age 60 captains from the company—is in no way mandated by the negotiated seniority system. That system provides only that seniority rights shall be forfeited upon severance from the company, but it does not, and lawfully cannot, specify that pilots who attain age 60 shall be severed. See *id.* §623(f)(2) (no bona fide seniority system "shall require or permit the involuntary retirement of any individual . . . [protected under the Act] because of the age of such individual"). TWA's practice, "which equates involuntary retirement as a captain at age 60 with a complete severance from the company," *Stone v. Western*, *supra*, 544 F.Supp. at 37, is not part of a bona fide seniority system. The bona fide seniority defense is therefore unavailable to TWA as a matter of law. See *Johnson v. American Airlines, Inc.*, [31 Empl.Prac.Dec. [CCH] ¶33,417 (N.D. Tex. 1983)].

The bona fide seniority system defense may not be invoked as a "legitimate, nondiscriminatory reason" under the *McDonnell Douglas v. Green* formulation (TWA Br. 25-28). Where it is available, it is an affirmative defense which places the burden of proof on the employer to prove that its actions come within the narrow exception. *See Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 483-88 (7th Cir. 1980); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 375, 377-78 (9th Cir. 1982); *EEOC v. Home Insurance Co.*, 672 F.2d 252, 257 (2d Cir. 1982); *EEOC v. Baltimore & Ohio R.R.*, 632 F.2d 1107, 1110-11 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981); *cf. Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (Equal Pay Act defenses, including seniority system defense, are affirmative defenses). Here TWA's actions are expressly age-based. At age sixty, a Captain or First Officer "goes off the

[21] In 1978, the year in which the Thurston respondents turned age sixty, TWA's "success rate" was zero (p. 3, *supra*).

seniority list" (J.A. 974) and is required to retire.[22] As age is the sole determinant in these actions, they cannot be justified as "nondiscriminatory" reasons or as reasonable factors "other than age" (A-26 n.15).[23]

C. The ADEA §4(f)(1) Bona Fide Occupational Qualification (BFOQ) Defense Is Inapplicable.

ALPA and TWA contend that because crewmembers may not serve as Captains or First Officers beyond age 60 under the FAA's Age 60 Rule, they may be lawfully retired and precluded from serving as flight engineers under the bona fide occupational qualification (BFOQ) exception to the ADEA, 29 U.S.C. §623(f)(1). The Second Circuit properly rejected this argument, noting that "it would create an exception that would swallow the Act" (A-29). The court stated (A-28):

> ALPA's argument is unpersuasive. The terms of §623(f)(1) plainly reveal its purpose, which is to excuse only those age-based actions against employees that are related to the "particular job" (in this case captain or first officer). The Senate Report makes this clear. S. Rep. No. 493, 95th Cong., 2d Sess., 10-11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 513-14.

[22] In arguing that the Section 4(f)(2) seniority system defense is applicable, TWA attempts to circumvent the flat ban on mandatory retirement in that provision by contending that the FAA's Age 60 Rule, not TWA, forced respondents to retire. The FAA was not involved in TWA's retirement of respondents (A-10; J.A. 647). The FAA rule by its terms speaks only to cockpit "services" as Captain, First Officer or IRO, and does not govern service as flight engineer or employment relations as such (J.A. 543-47, 869-71). TWA's argument is defeated by its own practices from 1978 to 1980, when it employed some age sixty pilots who were still in a "status" (though not actively working in that status) subject to the Age 60 Rule (pp. 6-7, *supra*).

[23] Even if TWA's actions were considered as "reasonable factors other than age" under 29 U.S.C. §623(f)(1), they would still fail the "age as a determining factor" test (pp. 18-19, *supra*).

> See also H.R. Rep. No. 527, [95th Cong., 1st Sess.] at 12.
>
> That age less than 60 is a BFOQ for the particular job of captain or first officer provides no license for TWA to discriminate against those over 60 who wish to transfer to positions as flight engineers, for which age 60 is *not* a BFOQ, by permitting other captains and first officers to do so. To hold otherwise would frustrate the purpose of the ADEA, which is "to promote employment of older persons" and "to prohibit arbitrary age discrimination in employment," 29 U.S.C. §621(b), and the purpose of the 1978 amendments, which is "to protect older workers from involuntary retirement, . . . to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age." S. Rep. No. 493, *supra*, at 1, *reprinted in* 1978 U.S. Code Cong. & Ad. News 504; see also H.R. Rep. No. 527, *supra*, at 1, 2.

This holding is consistent with the construction of the BFOQ exception in other ADEA cases, including those in which the employer has attempted to utilize the FAA's Age 60 Rule to support a BFOQ for positions not covered by the rule. *Criswell*, 709 F.2d at 551 (flight engineer); *Stone*, 544 F.Supp. at 37-38 (same); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982) (corporate pilot); *EEOC v. City of St. Paul*, 671 F.2d 1162, 1165-66 (8th Cir. 1982) (fire chief); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 749 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983) (municipal firefighter); *see EEOC v. County of Los Angeles*, 706 F.2d 1039, 1041-42 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984) (hiring age for helicopter pilots); *contra, Johnson v. Mayor of Baltimore*, 731 F.2d 209 (4th Cir. 1984).

The court of appeals dismissed ALPA's lawsuit which was brought to establish age sixty as a BFOQ for flight engineers (A-16 to A-21). Petitioners' attempt to obtain the same result indirectly, by reliance on a BFOQ as-

sertedly applicable to a different job than the one in issue, must again be rejected as contrary to the ADEA's purposes.

II.

THE COURT BELOW PROPERLY FOUND WILLFUL VIOLATIONS OF THE ADEA.

TWA argues that the standard for a finding of willfulness under the ADEA should be the specific intent requirement derived from criminal law. Otherwise, TWA argues, liquidated damages would be "automatic" in any case involving discriminatory treatment. On the facts of this case, a finding of willfulness would be required under any legal standard (pp. 7-13, *supra*). The issue before this Court, however, involves the appropriate legal standard for willfulness, not just whether a finding of willfulness flows automatically from a violation in a particular case.[24]

The specific intent test TWA advocates has been roundly rejected. It is inconsistent with the standard for willfulness in the FLSA and other civil statutes, and with every ADEA circuit case that has decided the issue, except one.[25] The correct standard is the willfulness standard

[24] A plaintiff's proof under the ADEA may range from compelling direct evidence of discriminatory intent in a case such as this, to a disparate impact case in which no proof of motivation is required. Willfulness, like liability, proceeds from the facts of each particular case, and it is not possible to state categorically that a finding of willfulness will or will not accompany a violation in any type of case. *See McDonnell Douglas*, 411 U.S. at 802 n.13.

[25] The Second Circuit rejected a specific intent test (A-33), as have six other courts of appeals. *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184-85 (6th Cir. 1983); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155-56 (7th Cir. 1981); *Hedrick v. Hercules*, 658 F.2d 1088, 1096 (5th Cir. 1981); *Spagnuolo*, 641 F.2d

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utilized in FLSA cases, which requires a showing that the defendant knew or should have known its actions were governed by the ADEA. Alternatively, the Second Circuit's test for willfulness, which requires that an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (A-33), is modeled on an appropriate civil intent standard and satisfies the requirements in ADEA cases decided by other circuits.

A. The Test for Willfulness Under the ADEA Does Not Require Proof of Specific Intent.

TWA cites no direct statement from the ADEA legislative history that proof of specific intent is required for a finding of willfulness. An examination of the legislative history and the purposes of the ADEA demonstrates that the test for willfulness under the ADEA does not require proof of specific intent.

The liquidated damages provision of Section 7(b) originates from an amendment proposed by Senator Javits. The prior age discrimination bill would have imposed criminal penalties for willful violations. S.830, H.R. 3651, 90th Cong., 1st Sess., 113 Cong. Rec. 2794-96 (1967). Under the amended bill, these criminal penalties were eliminated and replaced by the civil liquidated damages remedy. *See* 113 Cong.Rec. 7077 (1967) (Amendment No. 125); S. 830, 90th Cong., 1st Sess., §7(b) as reported from Committee on Labor and Public Welfare, 113 Cong.Rec. 31248 (1967). As Senator Javits explained, the civil remedy would 'furnish an effective deterrent to willful violations"

[25] *continued*
at 1114; *Kelly*, 640 F.2d at 980; *Mistretta v. Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980). *But see Loeb*, 600 F.2d at 1020 n. 27 (citing without discussion pattern jury instruction on criminal willfulness).

and, at the same time, avoid the "difficult problems of proof which would arise under a criminal provision." 113 Cong.Rec. 7076 (1967).

Rejection of the criminal sanctions originally proposed for Section 7(b) supports the presumption that Congress intended willful violations of the ADEA to be judged by civil rather than criminal standards. Whereas willfulness in a criminal context typically requires a showing of bad purpose—or specific intent—to disobey or disregard the law,[26] in a civil context the term is most often employed to distinguish between accidental conduct and conduct which is intentional, knowing, voluntary or marked by careless disregard. Specific intent is not a prerequisite for finding liability. *United States v. Murdock*, 290 U.S. 389, 394 (1933).[27]

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[26] The *mens rea* requirement generally remains an indispensable element of the prosecution's burden of proof in a criminal case. Typically, it has two components. First, there must be knowledge, and second, there must be a showing of bad purpose (or willfulness). *See, e.g., Morisette v. United States*, 342 U.S. 246, 250-51 (1952); *Dennis v. United States*, 341 U.S. 494 (1951). In a criminal context, willfulness refers to a bad purpose to disobey or disregard the law, and generally connotes a higher degree of specific intent than does "knowing," which has to do with the intentional doing of an act which the law forbids. *United States v. Sirhan*, 504 F.2d 818, 820 n.3 (9th Cir. 1974).

[27] Only in rare instances will courts interpret willful, as used in a civil statute, to require proof of specific intent in the criminal sense. For example, the Temporary Emergency Court of Appeals adopted a restrictive definition of willful in *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1012-13 (T.E.C.A. 1977), a case involving the Economic Stabilization Act of 1970. Based on an examination of the legislative history, the court concluded that Congress expressly intended to apply a criminal rather than a civil willfulness standard. The Third Circuit reached a similar result in *Frank Irey Jr., Inc. v. Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207 (3d Cir. 1975). There, however, the court adopted a restrictive interpretation in order to distinguish between two types of violations created under the statute—"serious violations"

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Further support for rejecting a specific intent standard is provided by the FLSA, which imposes less than a specific intent requirement even in its criminal enforcement provisions. Section 16(a) of the FLSA—which Congress declined to incorporate into the ADEA when it incorporated the liquidated damages provisions of Section 16(b) and (c)—imposes criminal penalties for willful violations. Nevertheless, courts interpreting this provision have refused to apply a specific intent standard, holding instead that a willful violation of the FLSA may be established by showing that a defendant's actions were deliberate, voluntary or intentional. *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951) (FLSA does not require that an offense be committed "malevolently, with bad purpose or an evil mind"); *Hertz Drivurself Stations v. United States*, 150 F.2d 923, 928-29 (8th Cir. 1945). *See also Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"). To adopt the strict criminal intent standard for the ADEA would lead to the anomalous result that a plaintiff seeking civil damages for willful age discrimination would have a higher burden to meet than the government seeking criminal sanctions for willful violations of the FLSA. The legislative history of Section 7(b) of the ADEA indicates that Congress intended precisely the opposite result.[28]

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[27] *continued*
and "willful or repeated" violations. The court explained that a specific intent standard was necessary to maintain the gradations of penalties and violations established under the statute. Neither policy argument applies to the ADEA.

[28] *See, e.g.*, Senator Javits' comments concerning substitution of a liquidated damages remedy under the ADEA for the criminal

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To make proof of specific intent a requirement for collecting civil damages under the ADEA also would run counter to the manner in which courts have interpreted willfulness under other civil statutes. The clear weight of authority holds that in a civil context "willful" will be interpreted broadly to include a wide range of conduct not limited to the specific intent requirement of criminal law. Courts have consistently followed this policy in interpreting provisions of the Internal Revenue Code[29] and in construing willfulness under other civil statutes which, like the ADEA, seek to distinguish between purposeful violators and violators whose actions are inadvertent, unintentional, or merely negligent. *See, e.g., United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243 (1933) (Railway Labor Act); *Bruce v. United States*, 621 F.2d 914, 917 n. 6 (8th Cir. 1980) (Privacy Act); *Brown-Forman Distillers Corp. v. U.S. Treasury Dept.*, 591 F.2d 375 (6th

[28] *continued*
sanctions originally proposed by the Administration. Referring to the liquidated damage provisions of Sections 16(b) and (c) of the FLSA, Senator Javits explained that the criminal provision proposed for the ADEA "is not only unnecessary but self-defeating . . . I would rather stick with the civil remedy as we do under the minimum wage law" 113 Cong.Rec. 2199 (1967). *See also Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (statement of Sen. Javits) ("there is no use giving people the argument that it has criminal sanctions as a reason for refusing to cooperate or testify in investigations or proceedings").

[29] *See, e.g., United States v. Pompiano*, 429 U.S. 10, 12 (1976) (willful does not require proof of any motive other than intentional violation of a known legal duty); *United States v. Bishop*, 412 U.S. 346, 381 (1973) (Congress intended the criminal penalties for willful violations to separate the purposeful tax violators from the well-meaning but easily confused mass of taxpayers); *Kalb v. United States*, 505 F.2d 506, 511 (2d Cir. 1974) (evil motive or intent to defraud not necessary to prove willfulness); *Monday v. United States*, 421 F.2d 1210, 1215 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) (conduct is willful if voluntary, conscious or taken with a reckless disregard for obvious or known risks).

Cir. 1979) (Federal Alcohol Administration Act); *Aero Mayflower Transit Co. v. I.C.C.*, 535 F.2d 997, 1000 (7th Cir. 1976) (Interstate Commerce Act); *Lauretex Textile Corp. v. Allton Knitting Mills*, 519 F.Supp. 730, 733 (S.D.N.Y. 1981) (Copyright Act).

TWA proposes a specific intent standard on the ground that liquidated damages are punitive rather than compensatory under the ADEA and therefore require some showing of malice or wantonness (Br. at 34-35). This Court rejected a similar argument in *Overnight Motor Transportation Co., Inc. v. Missel*, 316 U.S. 572, 583 (1942), when it held that the liquidated damages provision of Section 16(b) of the FLSA was compensatory rather than punitive. The same reasoning applies to Section 7(c) of the ADEA, which incorporates the "powers, remedies and procedures," including the liquidated damages provision, of Section 16(b) of the FLSA. *See Gibson v. Mohawk Rubber Corp.*, 695 F.2d 1093, 1102 (6th Cir. 1982); *Kolb v. Goldring*, 694 F.2d 869, 872 n.2 (1st Cir. 1982).

The similar treatment accorded prejudgment interest under the FLSA and the ADEA reinforces the argument that the ADEA's liquidated damages provision is compensatory, not punitive. It is settled that the FLSA does not permit successful plaintiffs to obtain prejudgment interest in addition to liquidated damages. As explained in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945): "Allowance of interest on minimum wages and liquidated damages recoverable under §16(b) tends to produce the undesirable result of allowing interest on interest." Courts have applied a similar reasoning in ADEA cases, holding that the compensatory nature of a liquidated damages award precludes a plaintiff from recovering additional, or duplicative, compensation in the form of prejudgment in-

terest. *Gibson*, 694 F.2d at 1102; *Spagnuolo*, 641 F.2d at 1114.[30]

B. The Standard of Willfulness Is the Same Under the ADEA and FLSA, and There Is No Good Faith Exception.

The Thurston respondents adopt the brief for EEOC on this point and further respond briefly to the "good faith" argument raised by TWA and amicus United Air Lines, Inc.

TWA argues that if this Court adopts the FLSA willfulness standard and holds that a defendant's violation of the ADEA is willful if it knew or should have known its actions were governed by the statute, then this Court should also permit a trial court discretion to deny or reduce a liquidated damages award if the defendant shows it acted in good faith (Br. at 37, n.49). The Fifth Circuit has taken this position and is alone in concluding that the ADEA incorporates the good faith provision of Section 11 of the Portal-to-Portal Act, 29 U.S.C. §260. *Elliott v. Group Medical & Surgical Services*, 714 F.2d 556, 558 n.2 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3860 (1984); *Hedrick*, 658 F.2d at 1096; *Hayes v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976).

There is no support for such an interpretation. In *Lorillard*, this Court found that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provi-

[30] This does not mean a plaintiff is always precluded from collecting prejudgment interest under the ADEA. Under both the FLSA and the ADEA, the award of prejudgment interest would be proper if no liquidated damages are awarded or if the liquidated damages awarded are less than the interest that would have been due from the date the back pay claim accrued. *McClanahan v. Mathews*, 440 F.2d 320, 325-26 (6th Cir. 1971); *accord*, *Gibson*, 695 F.2d at 1102 n. 9.

sions and their interpretations," 434 U.S. at 581. Indeed, Section 7 of the ADEA adopts specific provisions of both the FLSA and the Portal-to-Portal Act, but makes no reference to the good faith provision of Section 11. If Congress had intended the award of liquidated damages under the ADEA to be limited by Section 11, that provision would have been specifically incorporated. *See Loeb*, 600 F.2d at 1020; *Syvock*, 665 F.2d at 154; *Kelly*, 640 F.2d at 981; *Wehr*, 619 F.2d at 279.

Amicus United Air Lines, Inc. argues that a good faith exception is necessary to accommodate a defendant asserting a statutory affirmative defense (Br. 6-7). Absent such an exception, United suggests that a defendant will automatically be liable for liquidated damages if its defense fails.[31] This reasoning, however, ignores the fact that a finding of willfulness depends upon a defendant's state of mind at the time the discriminatory acts occurred. *Syvock*, 665 F.2d at 155.

C. Alternatively, the Second Circuit Test Satisfies the Civil Intent Standard and Other ADEA Court Tests for Willfulness.

Under the Second Circuit's willfulness test an employer will be liable for liquidated damages if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (A-33). This test comports with the civil standard of willfulness adopted in *Murdock*, 290 U.S. at 394:

> The word often denotes an act which is intentional, or knowing, or voluntary as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. The

[31] United did not appeal this point in its own case, although the willfulness instruction given was patterned after *Syvock*, and therefore omitted any reference to "good faith."

> word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one had the right so to act.

The "knowing and voluntary" test of *Murdock*, the model for the Second Circuit test, remains the general standard for interpreting willfulness in a civil context.[32]

The Second Circuit's test also satisfies the willfulness requirements prevalent in ADEA cases. The Fourth, Fifth and Tenth Circuits utilize the FLSA test for willfulness in ADEA cases. These courts hold that a defendant willfully violates the ADEA if it knew or should have known its actions were governed by the ADEA. *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982); *Hedrick*, 658 F.2d at 1096; *Mistretta*, 639 F.2d at 595. A showing that defendant knew or should have known its conduct was prohibited by the ADEA necessarily encompasses the FLSA standard for willfulness.

The Third, Sixth, Seventh and Ninth Circuits employ willfulness tests which, like the Second Circuit test, require some showing of defendant's actual or constructive knowledge that its conduct was prohibited. The Ninth Circuit requires that a violation be "knowing and intentional." *Kelly*, 640 F.2d at 980. Under the Third Circuit's formulation, a defendant's actions are willful if they are either "voluntary and not accidental, mistaken or inadvertent" or taken "in reckless disregard of consequences." *Wehr*, 619 F.2d at 283.[33] The Sixth Circuit has stated its agreement with the test in *Wehr*. *Blackwell*, 696 F.2d at 1185. Similarly, the Seventh Circuit has held that a plaintiff proves willfulness by showing that "the defendant's actions were knowing and voluntary and that he knew or reasonably should have known those actions violated of the ADEA."[34] *Syvock*, 665 F.2d at 156.

[32] *See, e.g., Pompiano*, 429 U.S. at 12 (Internal Revenue Code); *Bruce*, 621 F.2d at 917 n. 6 (Privacy Act); *Lauretex*, 519 F.Supp. 730 (Copyright Act); *Carroll v. Exxon Corp.*, 434 F.Supp. 557, 560-61 (E.D.La. 1977) (Fair Credit Reporting Act). *See also Illinois Central Railroad Co.*, 303 U.S. at 243, a case brought under the Railway Labor Act involving the willful failure to properly feed and water animals. The Court adopted *Murdock*, explaining:

> 'Willfully' means something not expressed by 'knowingly,' else both would be used conjunctively. * * * But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of the carrier is hardly within the pale of actual experience or reasonable supposition. * * * So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

[33] Although the Third Circuit did not explain whether the phrase "reckless disregard of consequences" referred to a defendant's knowledge of the ADEA or its knowledge that its conduct was prohibited, the Second Circuit has interpreted this standard to require a showing that the defendant knew or acted in reckless disregard as to whether its conduct was prohibited by the ADEA. *See Goodman v. Heublein, Inc.*, 645 F.2d 127, 151 (2d Cir. 1981). This interpretation of the Third Circuit's recklessness standard is consistent with the standard employed by the Seventh Circuit. *Syvock*, 665 F.2d at 154 n.5.

[34] Contrary to TWA's assertion (Br. at 31-32), the Seventh Circuit's test does not require specific intent. The "knew or reasonably should have known" language is a constructive knowledge standard derived from civil not criminal law.

III.

THE ADEA AUTHORIZES RECOVERY OF MONEY DAMAGES AGAINST LABOR ORGANIZATIONS THAT DISCRIMINATE ON THE BASIS OF AGE.

The ADEA expressly prohibits labor organizations from discriminating against individuals on the basis of age. 29 U.S.C. §623(c). The Second Circuit found that ALPA had opposed the employment of flight engineers beyond age

sixty and had aided and abetted TWA's unlawful age discrimination (A-32 to A-33). A finding that labor organizations are subject to liability for damages for violating the ADEA is consistent with the legislative history and purpose of the ADEA, and with the explicit language of the statute.

A. The Legislative History and Purpose of the ADEA Favor Holding Unions Liable for Age Discrimination.

The substantive provisions of the ADEA were "derived *in haec verba* from Title VII" of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(c). *Lorillard*, 434 U.S. at 584.[35] The ADEA's prohibitions of discrimination on the part of labor organizations are identical to those of Title VII, and parallel the prohibitions against discrimination by employers. *Compare* 29 U.S.C. §623(a) and (c) *with* 42 U.S.C. §2000e-2(a) and (c).

In enacting the ADEA, Congress found that "the setting of arbitrary age limits regardless of potential for job performance has been a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. §621(a)(2). The purposes of the ADEA include "promot[ing] employment of older persons based on their ability rather than age" and "prohibit[ing] arbitrary age discrimination in employment." 29

[35] The ADEA is in fact a direct outgrowth of Title VII, as Congress, in enacting the 1964 statute, directed the Secretary of Labor to conduct a study of age discrimination in employment. Civil Rights Act of 1964, Pub. L. No. 88-352, §715, 78 Stat. 265 (1964). The Secretary's report, which recommended a "clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age," Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 38 (1965), provided impetus for the enactment of the ADEA. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 1-2 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 1-2 (1967).

U.S.C. §621(b). The ADEA and Title VII "share a common purpose, the elimination of discrimination in the workplace." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). Where two statutory provisions share a common purpose, identical language, and one was the source of the other, they are to be construed similarly. *Oscar Mayer*, 441 U.S. at 756; *see Northcross v. Board of Education of Memphis City Schools*, 412 U.S. 427, 428 (1973).

Courts interpreting the ADEA have looked to cases decided under Title VII for guidance, recognizing that cases under one statute "have value as precedent for cases arising under the other." *Coke v. General Adjustment Bureau*, 640 F.2d 584, 587 (5th Cir. 1981) (en banc).[36] It is undisputed that Title VII provides for monetary awards against labor organizations. *See* ALPA's Brief in Opposition to Certiorari in No. 83-997 at 29-30; *see also Russell v. American Tobacco Co.*, 528 F.2d 357, 365-66 (4th Cir. 1975), *cert. denied*, 425 U.S. 935-36 (1976); *Kaplan v. IATSE*, 525 F.2d 1354, 1360 (9th Cir. 1975).

[36] The Fifth Circuit in *Coke* relied on Title VII cases in construing the 180-day filing requirement in 29 U.S.C. §626(d). Other circuits also have done so. *See, e.g., Morgan v. Washington Manufacturing Co.*, 660 F.2d 710, 712 (6th Cir. 1981); *Ciccone v. Textron, Inc.*, 616 F.2d 1216 (1st Cir.), *vacated and remanded*, 449 U.S. 914 (1980); *Ewald v. Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183 (6th Cir.), *vacated and remanded*, 449 U.S. 914 (1980). The latter two cases were remanded in light of *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), a Title VII case. *See also Aronsen v. Crown Zellerbach*, 662 F.2d 584, 589 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 1183 (1983) (approving use of Title VII cases to construe the ADEA); *Loeb*, 600 F.2d at 1015-16 (approving application of Title VII burden and methods of proof to ADEA cases); *Geller*, 635 F.2d at 1032 (same); *Kentroti v. Frontier Airlines, Inc.*, 585 F.2d 967, 969 (10th Cir. 1978) (same); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234-37 (5th Cir. 1976) (applying Title VII bona fide occupational qualification test in ADEA action).

Nothing in the ADEA's legislative history even remotely suggests that the statute's prohibitions against age discrimination by unions were intended to be mere paper tigers lacking any enforcement bite. To the contrary, the ADEA's purposes and legislative history make plain that Congress sought to strike out age-based discrimination by employers, labor organizations, and employment agencies.[37] A finding that labor organizations which engage in age discrimination are liable for damages is consistent with congressional intent to deter such conduct and to provide make-whole relief for aggrieved individuals.

B. The Express Language of the Statute Authorizes Monetary Relief Against Labor Organizations.

ADEA Section 7(b) provides district court jurisdiction to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter." 29 U.S.C. §626(b). Section 7(c) authorizes awards of "such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. §626(c).[38] There is no indication that Congress intended to exempt labor organizations from these broad remedial provisions. To the contrary,

[37] Despite the testimony of an AFL-CIO spokesman that he was "not aware of any facts that would indicate a need to forbid discriminatory practices on account of age by labor unions" and his request that the bill's provisions regarding unions be deleted, ADEA Section 4(c) was enacted as originally proposed. *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 95 (1967). *See* S. 830, 90th Cong., 1st Sess. §4(c), 113 Cong. Rec. 2794 (1967).

[38] The words "purposes of *this* chapter" in both subsections is significant, referring to the ADEA's goal of eradicating age discrimination in employment. *Cf. Lorillard*, 434 U.S. at 584 (Title VII and ADEA share the aim of eliminating discrimination from the workplace); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (Title VII's purpose is to make whole victims of unlawful employment discrimination).

the remedies are available in "any action" brought by "[a]ny person aggrieved." 29 U.S.C. §626(b), (c); *see Lorillard*, 434 U.S. at 581.

ALPA's position that it is absolutely immune from liability for damages under the ADEA is based on the fact that the statute incorporates, in part, the enforcement procedures of the Fair Labor Standards Act, 29 U.S.C. §201 (FLSA).[39] In opting for FLSA-type enforcement, Congress rejected several alternative proposals.[40] As this Court has noted:

> The bill that was ultimately enacted is something of a hybrid, reflecting, on the one hand, Congress' desire

[39] Although enforcement authority initially was given to the Secretary of Labor, it was transferred in July 1979 to the U.S. Equal Employment Opportunity Commission. 44 Fed. Reg. 37974 (1979).

[40] These included the following:

1. Adopting the more restrictive mechanisms of Title VII, with enforcement by the EEOC. *Lorillard*, 434 U.S. at 578; *see* 112 Cong. Rec. 20823-24 (1966).

2. National Labor Relations Act-type enforcement, allowing the Secretary of Labor to issue cease and desist orders enforceable in the Courts of Appeals, with no private right of action. As originally proposed, this measure authorized the issuance of complaints against labor organizations as well as employers. S. 830, 90th Cong., 1st Sess. §§7(b)(1) and 12(a), 113 Cong. Rec. 2795 (1967). *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2218.

3. Making discrimination based on age unlawful under the FLSA. H.R. 13712, 89th Cong., 2d Sess., 112 Cong. Rec. 20819 (1966). *See* S. Rep. No. 1487, 89th Cong., 2d Sess. 78-80 (1966). Congress' rejection of this proposal is particularly significant in light of ALPA's reliance on the literal language of the FLSA and cases under the Equal Pay Act of 1963 (EPA), 29 U.S.C. §206(d). While the EPA is an amendment to the FLSA, the ADEA is a separate free-standing statute with significantly different prohibitions and remedies. *See Naton v. Bank of California*, 72 F.R.D. 550, 554 & n.9 (N.D. Cal. 1976), *aff'd in part, remanded in part*, 649 F.2d 691 (9th Cir. 1981). *Brennan v. Emerald Renovators, Inc.*, 410 F.Supp. 1057 (S.D.N.Y. 1975), cited by the court below (A-38), is thus inapposite.

> to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the pre-existing schemes.

Lorillard, 434 U.S. at 578; *see EEOC v. Chrysler Corp.*, 546 F.Supp. 54, 59-60, 73-75 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984).[41]

ADEA Section 7(b), 29 U.S.C. §626(b), provides that the ADEA "shall be enforced in accordance with the powers, remedies and procedures" of FLSA Sections 16 and 17, 29 U.S.C. §§216, 217. ALPA argues that FLSA Section 16, by its terms, applies only to employers, and Section 17 provides for injunctive relief only.[42] From this, ALPA concludes that Congress immunized labor organizations from financial liability for age discrimination.

ADEA Section 7(b) further provides, however, that "[a]ny act prohibited under Section 4 of this Act [29 U.S.C. §623] shall be deemed to be a prohibited act under Section 15 of the Fair Labor Standards Act [29 U.S.C. §215]." 29 U.S.C. §626(b). Under FLSA Section 15(a)(2), it is unlawful for "any person" "to violate any of the provisions of Section 206 or 207 of this title . . .," which by their terms apply only to employers.[43] Section 15(a)(3) prohibits "any person" from "discharg[ing] or in any other

[41] As noted by Senator Javits, the ADEA's principal sponsor, "the enforcement techniques of the FLSA have been incorporated by reference . . . with appropriate modifications necessary to accommodate them to the purposes of this legislation." S. Rep. No. 723, 90th Cong., 1st Sess. 13-14 (1967) (individual views of Mr. Javits).

[42] EEOC is correct in its brief in noting that courts may grant equitable relief (including back pay against unions) to private parties under Section 17 in ADEA actions, although such relief is available under the FLSA only in actions brought by the government.

[43] These sections refer to the minimum wage and overtime compensation, respectively.

manner discriminat[ing] against any employee" who has filed a complaint or has initiated or testified in proceedings under or related to the FLSA.[44] The FLSA defines "person" to include "any individual, partnership, *association*, corporation, business trust, legal representative, or *any organized group of persons*." 29 U.S.C. §203(a) (emphasis added).

The prohibitions of FLSA Section 15 apply to labor organizations. *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 38-39 (3d Cir. 1943). *See Meek v. United States*, 136 F.2d 679, 680 (6th Cir. 1943) ("[T]he differentiation between the prohibitions in other sections of the [FLSA] directed to 'employer,' and those [in §15] to 'any person,' is significant of the intent of Congress"); *Wirtz v. Ross Packaging Co.*, 307 F.2d 549, 550 (5th Cir. 1966) ("The *prohibitions* of Section 15(a)(3) are . . . unlimited, for they are directed to 'any person.' ").

Violations of FLSA Section 15(a)(2) by any person are therefore deemed "employer" violations of FLSA Sections 6 or 7 and are actionable under FLSA Section 16(b), which provides that "any employer who violates the provisions of [29 U.S.C. §§206, 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation. . . ." Bringing the statutory construction full circle, the ADEA provides that "[a]mounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title. . . ." 29 U.S.C. §626(b).

[44] This FLSA provision is similar to ADEA Section 4(d), which prohibits employers, employment agencies, and labor organizations from discriminating against individuals who oppose practices outlawed by the ADEA or who have filed charges, testified, assisted, or participated in an investigation, proceeding, or litigation under the ADEA. 29 U.S.C. §623(d).

In summary, amounts owing to individuals aggrieved under the ADEA are deemed minimum wage or overtime compensation. It is unlawful under FLSA Section 15 for any person to fail to pay the minimum wage or overtime. Any violation of ADEA Section 4, including unlawful conduct by labor organizations, also violates FLSA Section 15. Thus, any person, including a union, whose actions violate the prohibitions of ADEA Section 4 is liable to the aggrieved party for amounts owing.

ALPA's reliance upon the literal language of FLSA Sections 6 and 7 ("no employer") would abrogate the sentence in ADEA Section 7(b) which provides that Section 4 violations are considered violations of FLSA Section 15. It is elementary that where possible, a statute should not be construed in such a way as to make any of its provisions superfluous or redundant. *See, e.g. Patagonia Corp. v. Board of Governors of the Federal Reserve System*, 517 F.2d 803, 813 (9th Cir. 1975); 2A C. Sands, *Sutherland Statutory Construction* §§46.06, 46.07 (4th ed. 1973); *cf. Oscar Mayer*, 441 U.S. at 757 (rejecting an interpretation of ADEA Section 14(b) which would strip it of all meaning). By providing that violations of ADEA Section 4 are also violations of FLSA Section 15, Congress intended that all persons subject to the ADEA's prohibitions would be liable for legal and equitable relief under ADEA Section 7. *See EEOC v. ALPA*, 489 F.Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981) (labor organization liable); *Brennan v. Hughes Personnel, Inc.*, 8 Empl. Prac. Dec. [CCH] ¶9571 (W.D. Ky. 1974) (employment agency liable).

The analysis in *Neuman v. Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cas. [BNA] 1488 (N.D. Ill. 1982), cited by the court below (A-38), is flawed in several respects. First, the court ignored the ADEA's cross-reference to FLSA Section 15, as discussed above. Next, the court relied solely on cases decided under the Equal Pay Act,

which is an amendment to the FLSA. *See* note 40, *supra*. The ADEA, in contrast, is a separate statute with broader coverage, prohibitions, and relief. Finally, the *Neuman* court incorrectly assumed that the word "remedies" in ADEA Section 7(b), 29 U.S.C. §626(b), refers to the parties from whom relief may be sought. This distorts the traditional meaning of the word as simply the procedure by which relief is obtained, without reference to the parties against whom it may be sought. *See Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372, 384 (1918) ("a remedy is the means employed to enforce a right or redress an injury").

C. ALPA Willfully Violated the ADEA.

The Second Circuit held that ALPA's conduct violated ADEA Section 4(c)(3), 29 U.S.C. §623(c)(3).[45] The court found that "ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status." (A-32 to A-33).[46] Further, the court noted that ALPA's declara-

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[45] Both the Thurston respondents and the EEOC alleged in their complaints that ALPA had willfully violated 29 U.S.C. §623(c)(1), (2) and (3). (J.A. 58, 66-67, 92, 95-96). The Thurston respondents also alleged a willful violation of 29 U.S.C. §623(d) by ALPA. The facts support findings of liability under all of these provisions.

[46] ALPA contends that it is not liable to the Thurston respondents, based on the reference to "EEOC plaintiffs" on A-33. It is clear, however, from the discussion of ALPA's liability (A-31 to A-33) that the court found ALPA's unlawful actions to have harmed both groups of plaintiffs. *See* A-31 at n.18. Furthermore, the court entered judgment for appellants against ALPA and directed that each plaintiff be awarded such relief as he was entitled to against each defendant (A-35).

tory judgment action was an attempt "to use the ADEA to cut off the rights of the older flight engineers" (A-20) and that "the purpose of the ADEA would be frustrated by ALPA's declaratory action" (*id.*).

The record discloses a willful course of conduct by ALPA, seeking to deprive its most senior members of up to ten years of productive employment[47] and to delay implementation of the ADEA as long as possible. (pp. 11-13, *supra*). The ADEA's penalties for willful misconduct were fully appreciated by ALPA. Just days after TWA announced its change in policy, ALPA's president and outside counsel expressed the opinion that "if we deny a man the opportunity to work beyond age 60 when the Company has offered him this opportunity, ALPA would quite likely be liable for a considerable amount of money." (R. 102, Ex. 37 at 4).

In addition to its actions to prevent all service beyond age sixty,[48] ALPA also engaged in activity to deprive and

[47] Respondents Thurston, Clark, and Parkhill had 36, 34, and 33 years of seniority, respectively, at the time of their involuntary retirements (J.A. 919-21, 911-12, 903-05).

[48] The conduct at issue here is consistent with ALPA's opposition to service after age sixty on other airlines. ALPA has been a party defendant in three other cases in which flight deck crewmembers have sought to continue their employment. *Ferrara v. Braniff Airways, Inc.*, No. CA 3-80-1273-R (N.D. Tex.) (consent decrees entered September 30, 1983); *Penton v. The Flying Tiger Line, Inc.*, No. CV-81-4419-RJK (C.D.Cal.) (consent decree entered June 20, 1984); *Neuman v. Northwest Airlines, Inc.*, No. 79 C 1570 (N.D.Ill.) (consent decree entered April 5, 1983). ALPA also has been a third-party defendant in four other cases. *Worley v. Continental Air Lines, Inc.*, No. CV-80-1110-WMB (C.D.Cal.) (consent decree entered December 27, 1982), *appeal pending*, Nos. 83-5594 *et al.* (9th Cir.); *Monroe v. United Air Lines, Inc.*, 31 Empl.Prac.Dec. [CCH] ¶¶33,330, 33,331 and 32 Empl.Prac.Dec. ¶33,658 (N.D.Ill. 1983), *rev'd and remanded*, Nos. 83-1245 *et al.* (7th Cir. May 30, 1984); *Stone v. Western*, 544 F.Supp. 33; *Richardson v. Alaska Airlines, Inc.*, No. C81-974V (W.D. Wash.) (consent decree entered Nov. 1, 1982), *appeal pending*, No. 83-4021 (9th Cir.).

limit the employment opportunities of its oldest members. Immediately after TWA announced that it would employ age sixty flight engineers, ALPA submitted its discriminatory proposals to modify the pilot contract (pp. 12-13, *supra*). One of ALPA's proposals was that, in the event of a furlough, flight engineers over sixty would be the first crewmembers laid off, "starting with the most senior pilot" of that group. These crewmembers would be recalled only after the other furloughees, who would be among the most junior crewmembers at TWA (R. 102, Ex. 36 (§17(A)(3)). ALPA also prevailed upon TWA to impose restrictions on age sixty downbidders to make it more difficult for them to achieve flight engineer status (A-11 to A-12). Respondents are entitled to full statutory relief against ALPA, including money damages, for the union's willful violation of the ADEA.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision that TWA and ALPA violated the ADEA and that the violation was willful should be affirmed. The portion of

the decision holding ALPA not liable for damages should be reversed.

Respectfully submitted,

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